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IN THE

Supreme Court of the United States

October Term 1950

No. 441

RIGGS DEVELOPMENT COMPANY AND COLONIAL MORTGAGE CORPORATION, *Petitioners,*

vs.

DISTRICT OF COLUMBIA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF

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vs.

DISTRICT OF COLUMBIA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF

Riggs Development Company and Colonial Mortgage Corporation, petitioners herein, pray that a writ of certiorari issue to review the judgment entered September 11, 1950, in the United States Court of Appeals for the District of Columbia Circuit, in the causes entitled *Riggs Development Company, petitioner, v. District of Columbia,* No. 10144, and *Colonial Mortgage Corporation, petitioner, v. District of Columbia,* No. 10173.

STATEMENT OF MATTER INVOLVED

The District Assessor determined that the petitioners, corporations engaged in business in the District of Columbia, were liable for a deficiency of income tax. The propriety of this determination depends on whether the corporate income is ordinary income or gains realized from the sale of capital assets.

Under District law, a tax is imposed upon the taxable income, received from District of Columbia sources, of every corporation,[1] but the gain realized from the sale of a capital asset is not recognized in the computation of net income, a capital asset being defined as the property held by the taxpayer for more than two years, but excluding property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.[2] This definition compares with the corresponding provisions of the Internal Revenue Code.[3] The District statute requires the Assessor to apply as far as practicable the administration and judicial interpretations of the Federal Income tax law.[4]

The principal contentions of the petitioners are that in each case they were engaged in the single enterprise of constructing a group of dwellings for production of rental income; that construction proceeded under war-time restrictions of the War Production Board, one of the restrictions requiring the builder, as a condition to securing critical building materials, to elect to build for sale or rent at a price or rental fixed by the Board; that peti-

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[1] D. C. Code (1940) sec. 47-1502 (b).

[2] D. C. Code (1940) sec. 47-1506 (a).

[3] Internal Revenue Code, sec. 117 (j) (1), 26 U. S. C. A. 117 (j) (1).

[4] D. C. Code (1940) sec. 47-1529 (a).

tioners elected to build for rental purposes, in the case of one of the petitioners, under term leases; that the final decision to dispose of the property by sale was prompted by the amendment to the Servicemen's Readjustment Act of 1944 which created an unprecedented demand for housing accommodations for returning veterans, the decision to sell being similar to the case of any investor who decides to sell under the most favorable market conditions.

The Board of Tax Appeals of the District of Columbia affirmed the assessment, holding that the property of the petitioners, from the sale of which the income was derived, was not a capital asset, but that at and prior to the time of its disposal by sale it was held by the taxpayer primarily for sale to customers in the ordinary course of their business.

The United States Court of Appeals for the District of Columbia Circuit affirmed the decision of the Board of Tax Appeals.

BASIS OF THE COURT'S JURISDICTION

The jurisdiction of this Court is invoked under sec. 240 (a) of the Judicial Code, 28 U. S. C. A. 347.

The statute[5] construed and applied by the Court below, follows comparable provisions of the Internal Revenue Code,[6] and the Assessor of the District of Columbia is required to "apply as far as practicable the administrative and judicial interpretations of the Federal income tax law so that computations of income for the purposes of this title shall be, as nearly as practicable, identical with the calculations required for Federal Income tax

[5] D. C. Code (1940) sec. 47-1506 (a).

[6] Internal Revenue Code, sec. 117 (j) (1), 26 U. S. C. A. 117 (j) (1).

purposes."[7] Thus, the court below has, in effect, construed a statute of the United States.

The application of the capital gains feature of the Internal Revenue Code and Revenue Act of the District of Columbia, presents a matter of general importance in the construction and application of those laws.

There is no binding Federal authority to control this case, and the more nearly analogous cases in the Circuit Courts of Appeal are in conflict, and this fact was recognized by the Board of Tax Appeals (R. 14, 86).

The fulfillment of the legislative purpose in enacting the capital gains provisions of the revenue laws, and the tendency by this decision to defeat such purpose, are in question.

The judgment of the court below was entered September 11, 1950, and is final.

QUESTIONS PRESENTED

The question presented is whether a corporate taxpayer engaged in the single enterprise of constructing dwelling houses for the production of rental income under governmental restrictions limiting use for rental purposes at a prescribed rent, may properly be denied the benefit of the capital gains provisions of the revenue laws where, after having held the property beyond the period fixed by the statute, it disposes of it by sale upon the removal of the restrictions and the creation of an unprecedented demand for housing accommodations.

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[7] D. C. Code (1940) sec. 47-1529 (a).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

This case involves important questions under the capital gains provisions of the Internal Revenue Code.

It does not suffice to say that the determination of the Board of Tax Appeals is based upon findings of fact which "shall have the same effect as a finding of fact by an equity court or a verdict of a jury" and which "are treated as presumptively correct and are accepted unless clearly wrong."[8] The findings of the Board of Tax Appeals are not based upon disputed or conflicting evidence.

The real question is whether the plain intent of Congress to confer the benefits of the capital gains provisions upon the taxpayer and at the same time produce increased revenues, is to be defeated.[9]

Another question is whether there is uniformity of decisions in the application of these provisions so as to provide a clearly defined rule to guide the taxpayer who desires to avail himself of the benefits of the law.

Actually the Board of Tax Appeals was not put to making a determination of fact, there being no dispute, but rather to find a binding Federal authority in point. The Board found that the most nearly analogous cases in the Circuit Courts of Appeal were in conflict with each other. It then proceeded to its own interpretation of the applicable statute (R. 14, 86). This was not a finding of fact. The United States Court of Appeals for the District of Columbia Circuit affirmed the findings of the Board, adding to the conflict. The conflict should be resolved by this Court.

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[8] *District of Columbia* v. *Pace*, 320 U. S. 698, 702.

[9] *Burnet* v. *Harmel*, 287 U. S. 103.

WHEREFORE, petitioners pray the allowance of a writ of certiorari directed to the United States Court of Appeals for the District of Columbia Circuit to the end that this cause may be reviewed and the judgment of the lower Court reversed.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINION BELOW

The findings, decisions and memorandum of the Board of Tax Appeals are not reported (R. 9-15, 80-87). The opinion of the United States Court of Appeals for the District of Columbia Circuit will be reported in ..... U. S. App. D. C. ....; ..... Fed. (2d) .... (R. 150, 151).

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, 28 U. S. C. A. 347.

STATEMENT OF CASES

Petitioner, Riggs Development Company, commenced the construction of 71 houses on July 1, 1943 (R. 20) and fully completed them by March, 1944 (R. 21). The project was under the jurisdiction of the War Production Board which granted priorities for critical materials and Federal Housing Administration which insured loans under Title 603 of the Federal Housing Act (R. 33). February 2, 1944, the houses were leased under various term leases (R. 48-56). Petitioners then operated the tenant occupied properties but this proved unprofitable because of increased costs of operation (R. 23). Later an unprecedented demand for housing accommodations arose and petitioner thought it good judgment to sell (R. 30). Its Board of Directors thereupon authorized the sale of the property (R. 27). All houses were sold during the period July 9, 1946 to October 21, 1946, to war veterans (R. 23). The company's original intention was to construct the property for investment purposes (R. 29-30). It owned

no other property and was formed primarily for the purpose of acquiring the subdivision (R. 32). It engaged in no other business (R. 35). From the time of acquisition until its sale the property had never been placed on the market nor listed with brokers for sale (R. 36). In its return to the District of Columbia for the fiscal year ending February 28, 1947, the company reported a gain on the sale of the houses as not being recognized in the computation of its net income.

Petitioner Colonial Mortgage Corporation (formerly known as Dexter Realty Company) was incorporated solely for the purpose of building, owning and renting houses (R. 96). It acquired a tract of land February 17, 1942 (R. 112), upon which it proposed to erect 88 dwelling units and accordingly made due application to the Federal Housing Administration for insured loans and to War Production Board for license to obtain critical war materials. The application was granted and the company agreed to rent to migrant war workers (R. 92, 93) and further agreed to adopt a fixed "shelter" rental of $52.50 (R. 93). Construction was completed June 24, 1943 (R. 94), renting commenced on April 15, 1943, and by June, 1943, all the houses were rented (R. 106). The property was not offered for sale or sale considered or were the houses listed with real estate brokers. During the ownership of the property, the company owned no other property (R. 95, 96).

After considering mounting operating costs, the company decided to sell to returning veterans under the so-called G. I. Bill of Rights and due application was made to the Veterans Administration for its appraisal (R. 96). Sale commenced on June 5, 1946 (R. 107) and with the exception of one house occupied by an employee all were sold in 1947 (R. 107).

During the operation of the project the company owned no other property (R. 95, 96), never acted as broker and

had no income from any other property except from the group of 88 dwellings (R. 102). The company did not engage in the usual activities of a real estate operator (R. 104). It likewise made a return to the District of Columbia but treated the gain as not being recognized in the computation of net income. The District of Columbia offered no testimony (R. 110).

The Board of Tax Appeals of the District of Columbia affirmed the assessment of a deficiency in income made by the assessor (R. 9-15, 80-87).

The United States Court of Appeals for the District of Columbia Circuit affirmed the decision of the Board of Tax Appeals (R. 152).

SPECIFICATION OF ERRORS

1. The Board of Tax Appeals for the District of Columbia erred in finding that the properties sold by petitioners were, at the time of the sale thereof, held by them primarily for sale to customers in the ordinary course of their trade or business.

2. The finding of the Board is unsupported by the evidence.

3. The Board erred in interpreting or construing the taxing statute and erred in its application to the facts in this case.

4. The United States Court of Appeals for the District of Columbia Circuit erred in affirming the decision of the Board.

STATUTES INVOLVED

A partial text of the statutes involved in this case, so far as pertinent to the points set forth are as follows:

Section 47-1502 (b) D. C. Code (1940):

> *Tax on Corporations*—there is hereby levied for each taxable year upon the taxable income from District of Columbia sources of every corporation, . . . a tax at the rate of 5 per centum thereof.

Section 47-1506 (a) D. C. Code (1940):

> No gain . . . from the sale . . . of a capital asset shall be recognized in the computation of net income under this chapter. For the purpose of this chapter, "capital Assets" means property held by the taxpayer for more than two years . . . but does not include . . . property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

Section 117 (j) (1) Internal Revenue Code:

> *Definition of Property used in Trade or Business*:— For the purposes of this subsection, the term "property used in the trade or business" means . . . real property used in the trade or business, held for more than six months, which is not (A) property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

SUMMARY OF THE ARGUMENT

1. The evidence, as found by the Board of Tax Appeals for the District of Columbia, does not support a finding that the properties of petitioners were at and prior to the sale thereof held primarily for sale to customers in the ordinary course of their business, and that the gains therefrom should be taxed as ordinary income.

2. The facts being undisputed, the Board's decision cannot be said to be a finding on disputed facts, but rather an interpretation of the law. But this interpretation is without authoritative support, and creates a conflict which should be resolved by this court.

3. Uniformity of decisions in this kind of cases, is much desired so that a safe rule or guide may be established for the taxpayer to follow if he desires to avail himself of the benefits of the capital gains provisions of the taxing statutes, benefits which it was the plain intent of Congress to confer.

ARGUMENT

1. There is No Basis for the Finding of the Board That Petitioners' Properties Were Held for Sale to Customers in the Ordinary Course of Their Business.

All circumstances negative this finding. The property was held for more than two years. Each company engaged in a single enterprise, all the dwellings in each group having been built at the same time as a single project. Both companies were under the jurisdiction of War Production Board and Federal Housing Administration, and elected to build for rental use at rates prescribed by these agencies. During the ownership and operation of the property, the companies engaged in no other activity, did not offer the property for sale, nor list it with brokers for that purpose.

Not until war time restrictions were removed, and an unprecedented demand created for the property by reason of the amendment to the Servicemen's Readjustment Act of 1944, and mounting costs making the venture unprofitable did petitioners decide to sell. Thus, petitioners' action was prompted by the same motives that move an investor who, confronted with rising costs of operation decides to sell an unprofitable venture at a time of most favorable market conditions.

2. The Board's Decision is Based Upon an Interpretation of the Law Which is Without Authoritative Support, and Creates a Conflict Which Should be Resolved by This Court.

No evidence was offered by the Respondent. The facts were not in dispute. The lower court in affirming the decision of the Board, stated in its opinion: "We agree that the houses, when sold, were held for sale as the Board *found.*" (emphasis added) Thus the lower Court adopted the findings of the Board observing that the findings of fact "are to be undisturbed unless clearly wrong.", relying on *District of Columbia* v. *Pace,* 320 U. S. 698, 702 (R. 151).

But the Board in support of its findings of fact and conclusions of law, filed a memorandum of authorities (R. 13-15, 85-87). A consideration of this memorandum at once demonstrates that the Board was not put to making a finding upon disputed evidence, but rather to find authoritative support for the conclusion it reached on the law.[10] After noting that the District Assessor was required to apply, as far as practicable, the judicial and administrative interpretations of the Federal income Tax law and that the applicable portion of the District law was the same as the applicable portion of Federal law, the Board observed that there had been no rulings by the Federal authorities in similar situations up to the time of its decision. It found cases, more or less analo-

[10] In its findings of fact and conclusions of law, separately captioned, the determination that the property was held for sale to customers in the ordinary course of business was stated as a finding of fact, and that the property was not sold as a capital asset, as a conclusion of law (R. 12, 84).

gous, favoring the contentions of petitioners;[11] others more or less in support of the contention of respondent.[12]

After considering these authorities the Board concluded that "there being no binding Federal authority, in point, and the most nearly analogous cases not being reconcilable with each other, this decision gives effect of what seems to this Board to be the proper interpretation of the applicable local statute."

The reasoning of the Board is unique. It finds no evidence to justify a finding as to the purpose of acquiring the land. But while it finds that petitioners built the improvements with the intention of holding and renting them for the period of wartime restrictions, it finds no sufficient evidence that petitioners intended to hold and rent after the removal of restrictions. But it rejects these two points as not being controlling and recognizes that the ultimate fact for determination is whether at and about the time of sale the property was held primarily for sale to customers in the ordinary course of business. It then concludes as a matter of law that the properties of the petitioners are not "capital assets" within the meaning of the statute. (R. 13, 85).

The lower court having affirmed these findings, the announced rule of law is that a taxpayer, without more, is deemed at or about the time of its sale, to hold the property for sale in the ordinary course of his business. Now, not only are the authorities in conflict, as the Board found, but the lower court's interpretation is in conflict with those authorities.

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[11] *Phipps* v. *Commissioner*, 54 F. (2d) 469; *Cullen* v. *U. S.*, 57 F. Supp. 217; *Fahs* v. *Crawford*, 161 F. (2d) 315; *Foran* v. *Commissioner*, 165 F. (2d) 705; *Pope* v. *Commissioner*, 77 F. (2d) 599; Slack, 35 U. S. B. T. A. 271; and Farley, 72 C 198.

[12] *Gruver* v. *Commissioner*, 142 F. (2d) 363; *Oliver* v. *Commissioner*, 138 F. (2d) 910; and *Richards* v. *Commissioner*, 81 F. (2d) 369.

3. To Achieve Uniformity of Decisions and Fulfill the Intent of Congress as Reflected in the Enactment of the Capital Gains Provisions, This Court Should Resolve the Conflict.

It was said that purpose of the Act conferring the benefits of the capital gains provisions of the taxing laws, by reducing the regular tax rate, "was to stimulate consummation of profitable transactions in property bought for investment; in other words, to expedite sales of property which would be otherwise postponed by reason of the high rate of taxation. It was anticipated the government would be the gainer by increased revenues."[13]

This shows the necessity for a safe rule or guide for the taxpayer to follow if he desires to avail himself of the benefits of the capital gains provisions. To achieve uniformity in the decisions respecting the interpretation and application of this important provision, and to furnish such a guide, this Court should resolve the conflict.

CONCLUSION

It is respectfully submitted that the United States Court of Appeals for the District of Columbia Circuit erred in affirming the decision of the Board of Tax Appeals for the District of Columbia and that the writ of certiorari should issue to review and reverse the judgment of the lower Court.

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[13] *Dunigan* v. *Burnet*, 62 App. D. C. 221, 66 F. 2d 201, citing *Burnet* v. *Harmel*, 287 U. S. 103.

DEC 2
CHARLES ELMO

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OCTOBER TERM, 1950

RIGGS DEVELOPMENT COMPANY AND COLONIAL MORTGAGE CORPORATION, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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